

# Government Secrets, Fair Trials, and the Classified Information Procedures Act

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One of the most astounding characteristics of the pretrial stage of the Iran-Contra prosecution<sup>1</sup> was the enormous amount of classified information involved.<sup>2</sup> Both Oliver North and John Poindexter were intimately familiar with the most secret aspects of the covert operations conducted by the United States Government.<sup>3</sup> According to Independent Counsel Lawrence E. Walsh, lives depend on maintaining the secrecy of some of the information,<sup>4</sup> yet there was much concern that it would be necessary to disclose various sensitive classified documents in order to conduct a fair trial.<sup>5</sup> District Court Judge Gerhard A. Gesell threatened to dismiss the case if the government did not produce all the relevant materials, regardless of the sensitivity of the documents.<sup>6</sup>

At the heart of the controversy was the Classified Information Procedures Act (CIPA).<sup>7</sup> Passed by Congress in 1980, CIPA addresses the growing problem of graymail in criminal prosecutions. Graymail, the tactic of a defendant who threatens to disclose classified information in the course of a prosecution, poses a dilemma for the government: The prosecutor must either allow the disclosure of classified information or dismiss the charges against the defendant.<sup>8</sup> The Ninety-sixth Congress sought to

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1. The defendants included former National Security Advisor John M. Poindexter, former White House Aide Lt. Colonel Oliver L. North, retired Air Force Major General Richard V. Secord, and Secord's business associate Albert A. Hakim.

2. Groner, *Iran-Contra Trial Snagged on Classified Documents*, Legal Times, Apr. 18, 1988, at 3, col. 2. More than 300,000 classified documents have been collected by the Independent Counsel. See *id.* at 3, col. 1.

3. See Engelberg, *When the Case for the Defense is Top Secret*, N.Y. Times, Apr. 24, 1988, at 8E, col. 2.

4. Walsh declared that disclosure of some of the secret information could expose agents and operatives to "torture and death." TIME, May 9, 1988, at 45. Walsh told Judge Gesell that the CIA would never release many of the requested classified documents. See *North Trial Put Off Until After Election*, L.A. Daily J., Aug. 8, 1988, at 3, col. 5.

5. Judge Gesell ruled that the government must allow the defense to review the materials. See *North Trial Put Off Until After Election*, *supra* note 4, at 3, col. 3.

6. Judge Gesell warned that "[u]nless [the disclosure] issue can be reconciled by various stipulations or agreements . . . it's clear to me . . . that the conspiracy counts will have to be dismissed." *No More Documents, No More Charges, Says Iran-Contra Judge*, L.A. Daily J., July 28, 1988, at 3, col. 1; see *North Trial Put Off Until After Election*, *supra* note 4, at 3, col. 5; see Coyle, *A Logical Choice*, Nat'l L.J., May 30, 1988, at 27, col. 1.

7. 18 U.S.C. app. §§ 1-16 (1982).

8. See Note, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RES. L. REV. 84 (1980).

alleviate some of the risk of prosecuting charges involving classified information by providing for pretrial procedures to resolve issues of discovery and admissibility.

The Act has two primary provisions. First, under section 5, defendants must notify the government if they intend to use classified information in their defense.<sup>9</sup> Second, CIPA provides for pretrial hearings on discovery and admissibility concerns. Section 4 allows *in camera* and *ex parte* resolution of discovery issues.<sup>10</sup> Section 6 provides for pretrial hearings on admissibility. In one hearing, under section 6(a), the trial judge determines the relevance of the classified information,<sup>11</sup> and in another hearing, under section 6(c), the judge rules on the adequacy of substitutions offered by the government to be admitted in lieu of the classified documents.<sup>12</sup>

Much of the Iran-Contra pretrial proceedings focused on CIPA. Some commentators warned that application of CIPA in the case would have many pitfalls, including the possibility that the Act would prevent the case from ever reaching trial.<sup>13</sup> CIPA was at the center of the turmoil, given the substantial risk of graymail in the case.<sup>14</sup>

Previous case law, although sparse, has highlighted problems in interpreting the Act that may further complicate the task of judges managing criminal cases involving classified information. The extent to which the statute affects the discretion of judges in determining the relevance and admissibility of classified materials is unclear. Some courts have balanced the needs of the defendant against the interests of the government,<sup>15</sup> while others have used common relevancy standards.<sup>16</sup> After analyzing these conflicting approaches, this Note suggests that the best resolution is to preclude the judge from balancing the parties' competing interests in the disclosure of classified information when ruling on relevance, but to allow the court to strike such a balance when ruling on the adequacy of offered substitutes and stipulations. Although most of the controversy addressed

9. 18 U.S.C. app. § 5.

10. 18 U.S.C. app. § 4.

11. 18 U.S.C. app. § 6(a).

12. 18 U.S.C. app. § 6(c).

13. See, e.g., Groner, *supra* note 2, at 4, col. 2 (CIPA "may be too cumbersome in a case that involves hundreds of thousands of pages"). Even Judge Gesell expressed doubt about CIPA in this extraordinary case. *Id.* at 4, col. 1. The sheer volume of the documents caused the trials to be delayed. See *North Trial Put Off Until After Election*, *supra* note 4, at 3, col. 3.

14. See *No More Documents, No More Charges, Says Iran-Contra Judge*, *supra* note 6, at 3, cols. 1-2; Coyle, *supra* note 6, at 27, col. 1.

15. E.g., *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987) (balancing parties' interests when ruling on relevance and trial admissibility of classified information); *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (en banc) (same); see *infra* notes 93-107 and accompanying text.

16. E.g., *United States v. Juan*, 776 F.2d 256 (11th Cir. 1985) (balancing improper when ruling on relevance; court should rely on Federal Rules of Evidence); see the cases involving Edwin Wilson: *United States v. Wilson*, 732 F.2d 404 (5th Cir.), *cert. denied*, 469 U.S. 1099 (1984); *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983); *United States v. Wilson*, 586 F. Supp. 1011 (S.D.N.Y. 1983), *aff'd*, 750 F.2d 7 (2d Cir. 1984), *cert. denied*, 479 U.S. 839 (1986); *infra* notes 61-68 and accompanying text.

here concerns the disclosure of information at trial, issues of discovery are necessarily implicated.<sup>17</sup> This Note suggests that Congress amend CIPA to provide for a discovery process that functions in much the same manner as the disclosure process, instructing courts to resolve issues of relevance prior to addressing any claims of governmental privilege. After determining that certain classified information is discoverable without regard to its classified status, the judge should consider questions of privilege in developing and evaluating alternative submissions.

By separating the relevance questions and the disclosure questions in both the discovery and admissibility contexts, the relevance determinations are isolated from government secrecy claims, lessening the danger of biasing the judge against the defendant with nightmarish tales of national security problems. The security concerns will not go unheard, however, and the government can take steps calculated to reduce the disclosure of highly sensitive information by working with the court in fashioning alternatives to full disclosure of the information.<sup>18</sup>

### I. DISCLOSE OR DISMISS: THE COSTS OF GRAYMAIL

The successful use of graymail in national security cases is particularly harmful to the criminal justice process. As an Assistant Attorney General noted:

[Graymail] foster[s] the perception that government officials and private persons with access to military or technological secrets have a broad *de facto* immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.<sup>19</sup>

Testifying before Congress, a Justice Department official estimated that the desire of a defendant to discover or admit classified information at

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17. The discovery procedures will dictate what informational pool exists for § 6 admissibility determinations. "The best strategy available . . . is to try to weed out much of the classified material under section 4 before such information is disclosed to the defendant and he has an opportunity to enlarge his defense by using irrelevant details found in classified materials released to him." Office of General Counsel, Central Intelligence Agency, Experience Under the Classified Information Procedures Act 8 (May 2, 1984) (internal memorandum) (on file at Yale Law Journal). According to CIA attorney Fred Manget, the typical government response to a discovery request for classified information is to invoke § 4 of CIPA to exclude as much evidence as possible under discovery rules, and then use the machinery of CIPA §§ 5 and 6 to address any information ruled discoverable. Telephone interview with Fred F. Manget, Assistant General Counsel of the Central Intelligence Agency (May 27, 1988).

18. For a valuable overview of CIPA, see Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277 (1986).

19. S. REP. NO. 823, 96th Cong., 2d Sess. 4, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4294, 4297 [hereinafter S. REP. NO. 823] (statement of Philip Heymann, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

trial affects between five and ten prosecutions each year.<sup>20</sup> Even though cases involving graymail are few, the Iran-Contra case illustrates that the prosecutions are often significant.<sup>21</sup> Crimes that have posed graymail problems include espionage,<sup>22</sup> drug offenses,<sup>23</sup> gunrunning,<sup>24</sup> and even tax evasion<sup>25</sup> and mail fraud.<sup>26</sup>

Notwithstanding these risks, graymail does not necessarily imply wrongdoing. In certain situations, such as espionage prosecutions,<sup>27</sup> graymail may result legitimately and unavoidably from the preparation of a criminal defense.<sup>28</sup> Some practitioners contend that the main source of the disclose-or-dismiss dilemma is not the unscrupulous defense attorney,<sup>29</sup> but the government's own unwillingness to prosecute and its overclassification of information.<sup>30</sup> Thus, they regard the dilemma as largely

20. *Use of Classified Information in Federal Criminal Cases: Hearings on H.R. 4736 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 3 (1980) [hereinafter *Use of Classified Information*] (statement of Philip Heymann). It is difficult to discover when a prosecution has been discontinued because of the threatened disclosure of classified information. The Justice Department has taken steps to keep secret cases that have been dismissed because of the graymail threat. See, e.g., Sylvester, *Break in CIA-U.S. Attorney Bond*, Nat'l L.J., Apr. 19, 1982, at 3, col. 1 (U.S. Attorney fired for disclosing that CIA had prevented prosecution from continuing for national security reasons).

21. See, e.g., *United States v. Walker*, 796 F.2d 43 (4th Cir. 1986) (espionage); *United States v. LaRouche Campaign*, No. 86-323-K (D. Mass. Aug. 10, 1988) (LEXIS, Genfed library, Dist file) (obstruction of justice); *supra* note 16 (the *Wilson* cases); *infra* note 33. For examples of successful graymail tactics, see Alpern & Shannon, *Cases of 'Graymail'*, NEWSWEEK, Nov. 13, 1978, at 64.

22. The risk of disclosure of classified material is highest in espionage prosecutions because the "standard of proof under . . . espionage statutes often requires the disclosure of the contents of the classified document at issue." Note, *supra* note 8, at 92 n.49. The number of espionage cases has risen dramatically in recent years, and indications are that the prosecutions will continue. See *Record Year Puts Spy-Catchers in Spotlight*, Washington Post, Nov. 30, 1985, at A24, col. 4 (between 1966 and 1975 no federal espionage prosecutions, between 1975 and 1985 49 prosecutions).

23. *United States v. Porter*, 701 F.2d 1158 (6th Cir.) (defendants convicted of drug offenses sought discovery and examination of classified surveillance equipment), *cert. denied*, 464 U.S. 1007 (1983).

24. *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984) (defendant convicted of exporting firearms sought discovery of classified CIA materials).

25. *United States v. Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980) (defendants convicted of tax evasion sought discovery of classified information regarding CIA's "Bay of Pigs" operation).

26. *United States v. Jolliff*, 548 F. Supp. 229 (D. Md. 1981) (defendant charged with mail fraud and impersonating CIA officer sought to have classified information disclosed at trial).

27. *Graymail Legislation, 1979: Hearings on H. 4736 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 106 (1979) [hereinafter *Graymail Legislation, 1979*] (prepared statement of Philip Lacovara) ("As long as the basic elements of the [espionage] offense . . . include the element of injury to national security, the government must place evidence before the jury to establish that element. In addition, the defendant is entitled to place rebuttal evidence before the jury.').

28. *Id.* at 4 (prepared statement of Philip Heymann) ("[W]holly proper defense attempts to obtain or disclose classified information may present the government with the same 'disclose or dismiss' dilemma.').

29. But see *Graymail, S. 1482: Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 31 (1980) [hereinafter *Graymail, S. 1482*] (statement of Daniel Schwartz, former General Counsel, National Security Agency) (defendants routinely seek sensitive information, regardless of relevancy, to force abandonment of prosecution).

30. *Graymail Legislation, 1979, supra* note 27, at 75 (statement of Michael Scheininger, Assistant U.S. Attorney); see A.B.A. COMM. ON LAW AND NAT'L SEC., LITIGATING NATIONAL SECURITY ISSUES 7 (Aug. 9, 1982) (statement of attorney Earl Silbert) (before CIPA, intelligence agencies reluctant to recommend prosecutions involving classified information).

illusory.<sup>31</sup> According to the government, the graymail problem results primarily from the prosecutor's uncertainty as to whether the defendant will seek to disclose classified material and how the judge will deal with such information.<sup>32</sup> Even though there is controversy as to the true cause of the dilemma, those in charge of protecting national security information<sup>33</sup> and those generally associated with civil liberty causes<sup>34</sup> view the graymail problem as serious and worthy of attention.<sup>35</sup>

## II. CIPA AND THE AMBIGUITY OF THE EVIDENTIARY STANDARD FOR ADMISSIBILITY AND DISCOVERY

### A. CIPA

Congress designed CIPA as a procedural tool to reduce the effectiveness of the graymail tactic. The Act was to provide the prosecution with the opportunity to balance the harm to national security from prosecution and disclosure of classified documents against the harm from abandonment of prosecution.<sup>36</sup> The House Report on an early and substantially similar version of CIPA stated that the legislation "is not intended to infringe on a defendant's right to a fair trial or to change the existing rules of evidence and criminal procedure."<sup>37</sup> In the language of the Eleventh Circuit, the procedures simply aid in informing the government of "the 'price' the defendant asserts the government will have to pay if the prosecution continues."<sup>38</sup>

Section 4 of CIPA provides for defense discovery of classified information. The provision is an elaboration of a court's power under Federal

31. *Graymail Legislation, 1979*, *supra* note 27, at 106-07 (prepared statement of Philip Lacovara) (dilemma often false because most classified information is over-classified).

32. *See Graymail Legislation, 1979*, *supra* note 27, at 156 (statement of General Counsel for Central Intelligence Agency, Anthony Lapham); *Use of Classified Information*, *supra* note 20, at 4 (statement of Philip Heymann).

33. *Graymail Legislation, 1979*, *supra* note 27, at 93 (prepared statement of Philip Lacovara) ("[W]hile [graymail] affects a relatively small number of cases, they tend to be cases of unusual public importance.").

34. For executive officials who perform or are even tangentially connected with the performance of intelligence functions, "graymail" can mean a virtual immunity from Federal criminal investigation or prosecution "in the interests of national security"—even where criminal acts performed under color of office deprive others of their constitutional rights.

From a civil liberties point of view, the rights of individuals cannot be fully and effectively protected if such criminal conduct by Government officials cannot be investigated and prosecuted to the full extent of the law.

*Graymail*, S. 1482, *supra* note 29, at 49 (statement of Morton Halperin of ACLU).

35. *See id.* at 1-2 (statement of Senator Biden) (consensus among parties with diverse interests regarding seriousness of graymail).

36. *See S. REP. NO. 823*, *supra* note 19, at 4-5; H.R. REP. NO. 831, 96th Cong., 2d Sess., pt. 1, at 11 (1980) [hereinafter H.R. REP. NO. 831 pt. 1]; H.R. CONF. REP. NO. 1436, 96th Cong., 2d Sess. 12 (1980) [hereinafter H.R. CONF. REP. NO. 1436].

37. H.R. REP. NO. 831, 96th Cong., 2d Sess., pt. 2, at 3 (1980) [hereinafter H.R. REP. NO. 831 pt. 2], *see also* H.R. REP. NO. 831 pt. 1, *supra* note 36, at 11 (similar language).

38. *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983).

Rule of Criminal Procedure 16(d)(1) to determine issues of discovery.<sup>39</sup> Section 4 explicitly permits the court to grant, *ex parte* and *in camera*, government requests to delete specific data from classified materials, or substitute summaries or stipulations of facts.<sup>40</sup> When section 4 is invoked, a judge will determine the relevance of the information in light of the asserted need for the information and any claimed government privilege.<sup>41</sup> Under section 3 of CIPA, the court may issue a protective order forbidding the defendant from revealing discovered classified information.<sup>42</sup>

Section 5 of CIPA requires that defendants notify the court and the government when they expect to disclose classified information.<sup>43</sup> The notice must briefly describe in writing the information expected to be revealed. Should the defendant fail to comply with section 5, the court may issue sanctions, including suppressing the evidence that was subject to the notice requirement.<sup>44</sup>

After the defense has given notice, the government can request an *in camera* hearing under section 6(a) to determine the relevance of evidence that the defendant seeks to disclose at trial.<sup>45</sup> Should the court conclude that such evidence is relevant, the government can invoke section 6(c) of CIPA and request the admission of a stipulation of facts or a summary of the information in lieu of the specific classified information. The substitutions, however, must provide the defendant with "substantially the same ability to make his defense" as would the specific materials.<sup>46</sup> With its

39. S. REP. NO. 823, *supra* note 19, at 6; *see* United States v. Pringle, 751 F.2d 419, 427 (1st Cir. 1984).

40. *See, e.g.*, United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988); United States v. Pringle, 751 F.2d 419, 425-28 (1st Cir. 1984); United States v. Clegg, 740 F.2d 16, 17-18 (9th Cir. 1984); United States v. Porter, 701 F.2d 1158, 1162 (6th Cir.), *cert. denied*, 464 U.S. 1007 (1983). The § 5 discovery provision has been characterized by intelligence agency attorneys as "perhaps the most important section of CIPA." Office of General Counsel, Central Intelligence Agency, Experiences Under the Classified Information Procedures Act 4 (May 2, 1984) (internal memorandum) (on file at Yale Law Journal).

41. In this regard, courts tend to act in much the same manner as they would have had CIPA not been enacted. *Compare* United States v. Panas, 738 F.2d 278 (8th Cir. 1984) (non-CIPA discovery) with United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) (CIPA discovery).

42. 18 U.S.C. app. § 3.

43. *See* United States v. Collins, 720 F.2d 1195, 1200 (11th Cir. 1983). The Federal Rules of Evidence and the Federal Rules of Criminal Procedure specify similar notice requirements. FED. R. EVID. 412(c)(1) (notice required if defendant charged with rape intends to offer any evidence of specific instances of alleged victim's prior sexual behavior); FED. R. CRIM. P. 12.1 (notice required for use of alibi defense).

44. United States v. Badia, 827 F.2d 1458 (11th Cir. 1987) (defendant prohibited from asserting defense of CIA involvement because did not comply with § 5 notice requirement and demonstrated no reasonable excuse), *cert. denied*, 108 S. Ct. 1115 (1988). The sanction of forbidding defense testimony when a defendant violates a notice requirement recently survived constitutional challenge before the Supreme Court. Taylor v. Illinois, 108 S. Ct. 646 (defendant's deliberate and blatant failure to provide list of alibi witnesses justified sanction of excluding witnesses' testimony), *reh'g denied*, 108 S. Ct. 1283 (1988). The CIPA notice provision has thus far survived constitutional scrutiny. *See infra* notes 49-50 and accompanying text; *see also* United States v. Collins, 720 F.2d 1195, 1199-1200 (11th Cir. 1983) (articulating need for notice requirement of § 5).

45. *See, e.g.*, United States v. Wilson, 732 F.2d 404, 412 (5th Cir.), *cert. denied*, 469 U.S. 1099 (1984).

46. 18 U.S.C. app. § 6(c)(1).

request for alternative disclosures, the government may submit an affidavit both certifying that disclosure would damage the national security and explaining the basis for classification of the materials.<sup>47</sup> If the government requests, the court shall review the affidavit *in camera* and *ex parte*.<sup>48</sup> Thus far, CIPA has withstood constitutional attack,<sup>49</sup> including challenges in the Iran-Contra prosecution.<sup>50</sup>

### B. *Case Articulation of the Evidentiary Standard for Discovery and Admissibility*

It is often repeated that Congress did not intend CIPA to change any substantive rules of evidence.<sup>51</sup> The legislative history of the Act confirms that the drafters sought to avoid altering the standards for admissibility of evidence at trial.<sup>52</sup> Although clearly not created to change the standard for the admissibility of evidence, CIPA did not articulate the preexisting standard either. After grappling at great length with the issue of the evidentiary standard during hearings, Congress concluded only that the current standard, whatever that might be, should remain in force.<sup>53</sup>

Because Congress did not expressly define the current evidentiary stan-

47. 18 U.S.C. app. § 6(c)(2).

48. 18 U.S.C. app. § 6(c)(2).

49. See, e.g., *United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984) (§ 5 notice requirements), *cert. denied*, 479 U.S. 839 (1986); *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir. 1983) (Fifth Amendment guarantee against compulsory self-incrimination and Sixth Amendment right to confront witnesses); *United States v. Porter*, 701 F.2d 1158, 1162-63 (6th Cir.) (§ 4 discovery provisions violate neither Fifth Amendment right to fair trial nor Sixth Amendment right to confront witnesses), *cert. denied*, 464 U.S. 1007 (1983); *United States v. Collins*, 603 F. Supp. 301 (S.D. Fla. 1985) (§ 6(c) alternative disclosure provision not violative of Sixth Amendment compulsory process, due process, or equal protection); *United States v. Wilson*, 571 F. Supp. 1422, 1426-27 (S.D.N.Y. 1983) (CIPA definitions for national security and classified information not void for vagueness); *United States v. Jolliff*, 548 F. Supp. 229, 231 (D. Md. 1981) (§ 5 notice requirements not violative of Fifth Amendment guarantee against compulsory self-incrimination).

50. See Coyle, *Full Speed Ahead for D.C. Probes*, Nat'l L.J., July 11, 1988, at 10, col. 2 (§ 5 notice requirements).

51. See, e.g., *United States v. Smith*, 780 F.2d 1102, 1106 (4th Cir. 1985) (en banc); *Collins*, 720 F.2d at 1199; Note, *United States v. Smith: Construing the Classified Information Procedures Act as Restricting the Admissibility of Evidence*, 44 WASH. & LEE L. REV., 720, 721 & n.10 (1987); *supra* note 37 and accompanying text. By providing a framework in which the rules of evidence are to operate, however, CIPA inevitably affects the application of the rules (for example, the timing of the invocation of the rules). See *infra* text accompanying note 118; *infra* note 134 and accompanying text.

52. See, e.g., S. REP. NO. 823, *supra* note 19, at 8 ("A defendant should not be denied the use of information that he would otherwise use simply because of the procedures of this bill. . . . [T]he committee intends to retain [the] current [standard for admissibility], regardless of the sensitivity of the information."); H.R. REP. NO. 831 pt. 1, *supra* note 36, at 14-15 (similar language); H.R. REP. NO. 831 pt. 2, *supra* note 37, at 3 (similar language); H.R. CONF. REP. NO. 1436, *supra* note 36, at 12 (similar language).

53. See GRAYMAIL, S. 1482, *supra* note 29, at 4. A House Intelligence Committee report on CIPA, however, did address the issue of a state secrets privilege, and specifically rejected the notion for criminal trials. In a footnote the report said: "[I]t is well-settled that the common law state secrets privilege is not applicable in the criminal arena. To require, as some have suggested, that a criminal defendant meet a higher standard of admissibility when classified information is at issue might well offend against this principle." H.R. REP. NO. 831 pt. 1, *supra* note 36, at 15 n.12; see Tamana, *supra* note 18, at 367 n.272.

dards and seemingly left the task to the courts,<sup>54</sup> it is instructive to take a brief look at the competing discovery and trial admissibility rules.

### 1. *Discovery: Common Law "Government Privilege"*

In cases involving the discovery of classified, or unclassified but sensitive, government information, courts have relied on *Roviaro v. United States*<sup>55</sup> in developing a doctrine of governmental privilege. In *Roviaro*, the defendant sought disclosure of the identity of a government informer who witnessed and participated in the illegal activities with which the defendant was charged. The information was not classified. The Supreme Court allowed the discovery, but only after recognizing a governmental privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."<sup>56</sup> Although allowing for defense discovery of the information, the Court's language suggested that the defendant's need for the information should be balanced against the potential damage done by disclosure, and that the evidence must be more than simply relevant to be discovered and admitted at trial:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.<sup>57</sup>

The Court in *Roviaro* placed limits on the privilege. Under *Roviaro*, the government cannot prosecute a defendant without disclosing information "relevant and helpful" to the defendant, regardless of whether or not the government has a weighty interest in maintaining the secrecy of that information.<sup>58</sup> *Roviaro* has been extended beyond cases involving the identity of informants. The government privilege has been used to deny dis-

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54. See *infra* notes 80, 121-23 and accompanying text. But see Note, *supra* note 51, at 732 (arguing that CIPA prohibits courts from modifying evidence discovery and admissibility standards).

55. 353 U.S. 53 (1957).

56. *Id.* at 59.

57. *Id.* at 60.

58. *Id.* at 60-61 (footnotes omitted).



covery of sensitive surveillance techniques and equipment<sup>59</sup> and classified documents.<sup>60</sup>

## 2. *Trial Admissibility: Federal Rules of Evidence and Common Law "Government Privilege"*

One fundamental standard in CIPA trial admissibility cases, Federal Rule of Evidence 401, defines relevant evidence as that which tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>61</sup> Some courts have explicitly used this standard in evaluating evidence sought to be disclosed under CIPA,<sup>62</sup> while others have applied standards that are operatively equivalent to rule 401.<sup>63</sup>

In addition, the Second Circuit has applied rule 403 in a CIPA case.<sup>64</sup> Federal Rule of Evidence 403 provides for exclusion if the probative value of the evidence is outweighed by its prejudicial effect.<sup>65</sup> The Second Circuit used rule 403 in affirming a lower court's preclusion of classified information that the defendant sought to admit, as falling "under generally applicable evidentiary rules of admissibility."<sup>66</sup> And, although on its face limited to discovery requests, the *Roviaro* government privilege has been applied in determining trial admissibility of classified information.<sup>67</sup> The extension is not without its critics.<sup>68</sup>

59. *E.g.*, *United States v. Van Horn*, 789 F.2d 1492, 1507 (11th Cir.) (information concerning placement of hidden microphone privileged), *cert. denied*, 479 U.S. 854 (1986); *United States v. Green*, 670 F.2d 1148, 1156 (D.C. Cir. 1981) (location of police officer's observation post privileged); *see United States v. Morison*, 844 F.2d 1057, 1078 (4th Cir. 1988) (balancing parties' interests and denying discovery).

60. *E.g.*, *United States v. Pringle*, 751 F.2d 419, 428 (1st Cir. 1984) (*Roviaro* applied to CIPA § 4 discovery proceedings concerning classified surveillance information); *see also United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (balance permitted in CIPA § 4 discovery proceedings); *United States v. Badia*, 827 F.2d 1458, 1461, 1464 (11th Cir. 1987) (balance used in applying Foreign Intelligence Surveillance Act in discovery request), *cert. denied*, 108 S. Ct. 1115 (1988); Government's Preliminary Statement at 17, 19-24, *United States v. Clegg*, No. CR83-51R (W.D. Wash.), *aff'd*, 740 F.2d 16 (9th Cir. 1984) (government requests court to balance in CIPA § 4 discovery proceedings).

61. FED. R. EVID. 401.

62. *E.g.*, *United States v. Wilson*, 586 F. Supp. 1011, 1014 (S.D.N.Y. 1983) (quoting FED. R. EVID. 401), *aff'd*, 750 F.2d 7 (2d Cir. 1984), *cert. denied*, 479 U.S. 839 (1986).

63. *E.g.*, *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985) (court applied materiality standard, stating that evidence can be "material, whether or not it might ultimately be persuasive"); *United States v. Wilson*, 732 F.2d 404, 412 (5th Cir.) ("[W]e conclude that the district court correctly found this evidence inadmissible under the ordinary rules of evidence, separate and apart from any CIPA consideration."), *cert. denied*, 469 U.S. 1099 (1984).

64. *Wilson*, 750 F.2d at 9.

65. FED. R. EVID. 403. It is doubtful that the "unfair prejudice" in rule 403 is intended to refer to prejudicing the government's interest in nondisclosure of the classified document. The language refers to unfairly prejudicing the judge or jury. *See Graymail Legislation, 1979, supra* note 27, at 37 (statement of Philip Heymann).

66. *Wilson*, 750 F.2d at 9.

67. *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987) (remanded to allow government assertion of *Roviaro* privilege in CIPA § 6(a) relevance hearing); *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (en banc) (*Roviaro* applied to CIPA § 6(a) relevance hearing).

68. *E.g.*, *Graymail Legislation, 1979, supra* note 27, at 70 (statement of Michael Tigar); *id.* at

### C. *The Congressional Intention as to Evidentiary Standards for Admissibility*

Congress did not attempt to codify any single evidentiary standard for trial admissibility. Nevertheless, an analysis of the testimony given before Congress during the debate on the different versions of CIPA and an examination of the statute itself may give clues as to the intent of the legislature.

After several years of examining the graymail problem,<sup>69</sup> Congress began considering different versions of CIPA, two in the House,<sup>70</sup> and one in the Senate.<sup>71</sup> The administration proposed a version of CIPA that differed from the Murphy House bill and the Biden Senate bill in major ways. Because much of the testimony relevant to admissibility standards for classified information was provoked by the administration's bill, it is instructive to concentrate on that version of CIPA.

#### 1. *The Higher Relevance Standard for Admissibility*

Unlike the Murphy House bill and the Biden Senate bill, the administration's bill called for a "relevant and material" standard for resolving relevancy and admissibility issues in the section 6(a) hearing. Referring to the administration standard as "a touch, a half-step more than mere relevance,"<sup>72</sup> then-Assistant Attorney General Philip Heymann testified that the addition of the word "material" requires "more than that the evidence in question bears some abstract logical relationship to the issues in the case. It requires that the evidence be of significance to the defendant's case."<sup>73</sup>

Although drawing from the "relevant and helpful" test of *Roviaro*, the

44 (statement of Morton Halperin). *But see infra* notes 73, 90-91 and accompanying text.

69. Debate in Congress on the problems of graymail and potential solutions began as early as 1978. *See* NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE, REPORT OF THE SENATE SELECT COMM. ON INTELLIGENCE, SUBCOMM. ON SECRECY AND DISCLOSURE, 94th Cong., 2d Sess. 32 (1978).

70. Congressman Murphy introduced the first bill, on July 11, 1979. H.R. 4736, 96th Cong., 1st Sess. (1979). On February 12, 1980, the House Intelligence Committee unanimously reported the bill, as amended, to the House. *Use of Classified Information*, *supra* note 20, at 1. Ultimately, it was the Murphy bill that was largely adopted. Congressman Rodino introduced the second bill, prepared by the administration. H.R. 4745, 96th Cong., 1st Sess. (1979).

71. Senator Biden introduced a version of CIPA on July 11, 1979. S. 1482, 96th Cong., 1st Sess. (1979). On May 20, 1980, the Judiciary Committee passed the bill by a unanimous vote. S. REP. NO. 823, *supra* note 19, at 3.

72. *Graymail Legislation, 1979*, *supra* note 27, at 22 (statement of Philip Heymann); *see also id.* at 39 ("All we are asking for is that there be a touch more than marginal relevance, that it be something more than an argument that . . . a law school professor could make that perhaps it was relevant.").

73. *Id.* at 8-9. The administration justified this higher standard by arguing that "[s]ince the public interest in protecting the confidentiality of classified information is at least as substantial as the interest in protecting the identities of law enforcement informants, the *Roviaro* decision demonstrates that a more demanding standard than relevance should be employed to govern the disclosure of classified information." *Id.* at 11.

administration disavowed any intent to provide for balancing of the parties' interests in determining the admissibility of classified evidence. Heymann testified that "[t]he administration bill does not require or permit the value of evidence to the defendant to be weighed against the harm of disclosure to the national security."<sup>74</sup> Its adoption of *Roviaro* extended only to the requirement that classified material meet the heightened relevance test.<sup>75</sup>

Congress was aware that the extension of *Roviaro* was not universally applauded. At the hearings, the administration's use of the case provoked several strong criticisms from witnesses who argued that *Roviaro* did not consider admissibility issues and is limited to the informant context.<sup>76</sup> Yet courts have generally disagreed with critics' assessments of *Roviaro* and have extended its holding to allow a limited government privilege in cases dealing with sensitive information.<sup>77</sup> The enacted version of CIPA does not contain the administration's proposed "relevant and material" language. In fact, CIPA does not refer to any standard at all, providing only that the judge determine all the issues regarding "use, relevance, or admissibility" of classified information.<sup>78</sup>

Even in the wake of the criticism of the higher test proposed by the administration, it was not clear what standard was the current standard. Both proponents and opponents of the *Roviaro* higher relevancy test noted the confusion surrounding the standards courts use to determine admissibility.<sup>79</sup> Congress knew that rejecting the administration's language would not necessarily preclude courts from using the *Roviaro* standard.<sup>80</sup> Congress simply left it up to the judicial branch to develop the appropriate evidentiary test, and stated only that the current standard was not changed by CIPA.<sup>81</sup>

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74. *Id.* at 9.

75. The distinction between higher relevance and balancing is often overlooked by the courts and commentators. *See, e.g.,* Note, *supra* note 51, at 733 & n.112; *infra* note 91.

76. *Graymail Legislation, 1979*, *supra* note 27, at 69 (statement of attorney Michael Tigar); *id.* at 133-34 (statement of Georgetown Law Center Professor William Greenhalgh).

77. *E.g.,* *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (en banc) (*Roviaro* balancing applied in § 6(a) relevancy hearing); *United States v. Juan*, 776 F.2d 256 (11th Cir. 1985) (*Roviaro* balancing applied in § 6(c) alternative disclosure hearing); *see supra* notes 59-60 and accompanying text (*Roviaro* balancing applied in discovery decisions).

78. 18 U.S.C. app. § 6(a).

79. *Compare Graymail, S. 1482*, *supra* note 29, at 10 (statement of Philip Heymann) ("To be frank, I don't think that either of us can say that the standard of relevant and material is the present law or relevant is the present law.") with *id.* at 44 (statement of Morton Halperin) ("It is obviously very confused as to what the standard is, both for discoverability of material and admissibility.").

80. *Use of Classified Information*, *supra* note 20, at 7 (statement of Philip Heymann) (suggesting that rejection of administration language meant that Congress had concluded "it was sensible to leave [alteration of evidentiary standards] simply for judicial determination."); *see Graymail Legislation, 1979*, *supra* note 27, at 35 (statement of Philip Heymann) (inclusion of administration's language helpful but not necessary to argue that *Roviaro* applies). Some argue that CIPA does not prohibit *Roviaro* balancing because *Roviaro* was good law at the enactment of CIPA and Congress did not amend any law of evidence. *E.g.,* *United States v. Smith*, 780 F.2d 1102, 1106 & n.8 (4th Cir. 1985) (en banc). But *see* Note, *supra* note 51, at 733.

81. *See supra* notes 51-53 and accompanying text.

## 2. *The Classification Affidavit*

The administration's bill also differed from the Biden Senate bill in that it required the government to submit an affidavit explaining why the material was classified.<sup>82</sup> Under the administration's scheme, the affidavit would be submitted to the court prior to the court's determination of the admissibility of the classified materials.

The administration argued that its version would allow the judge to make a more informed decision and determine if the material was properly classified.<sup>83</sup> Morton Halperin of the ACLU disagreed, arguing that the affidavit would be prejudicial because it would "permit the decision on relevance to be colored by the claims of national security, exaggerated or real, made by the government."<sup>84</sup> Furthermore, opponents contended, the judge does not need to know why the information is classified in order to rule on admissibility. The sole purpose of the affidavit, one opponent testified, "is to scare the hell out of the district judge and to make him or her think that the information is so important that if she or he makes a misstep on the defendant's side as opposed to the prosecution's side irreparable damage will be caused to the country."<sup>85</sup> The government contended that without knowing the reasons for the classification of the materials, the judge would be unable to determine relevance issues or to create fair substitutions and stipulations to the sensitive information.<sup>86</sup>

Congress rejected the administration's proposal with regard to the stage at which the classification affidavit may be filed with the court. The enacted bill provides for such an affidavit only in the section 6(c) hearing on alternative disclosures.<sup>87</sup> The legislative history of the Act explicitly rules out balancing the parties' interests in disclosure. The Senate Report states, "[i]t should be emphasized, however, that the court should not balance the national security interests of the government against the rights of the defendant to obtain the information."<sup>88</sup> Congress agreed with the administration that the judge should not operate ignorant of the reasons behind the government's desire to submit alternatives to the classified material.<sup>89</sup>

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82. H.R. 4745, 96th Cong., 1st Sess. § 6(b) (1979). The Murphy House bill also contained an analogous provision allowing the government to show the basis for the classification before a judge rules on relevancy. H.R. 4736, 96th Cong., 1st Sess. § 103(b) (1979).

83. *Graymail Legislation, 1979, supra* note 27, at 20-21 (statement of Philip Heymann).

84. *Id.* at 43.

85. *Id.* at 71 (statement of Michael Tigar).

86. S. REP. NO. 823, *supra* note 19, at 7. Apparently, the basis for the administration's support of the affidavit provision was not the affidavit's value as an informational tool in balancing party interests. The administration did not propose the adoption of a balancing test at all. *See supra* notes 72-75 and accompanying text.

87. 18 U.S.C. app. § 6(c)(2).

88. S. REP. NO. 823, *supra* note 19, at 9.

89. The House Committee on Intelligence report on the first version of CIPA presented to the House noted that the *ex parte* submission of a classification affidavit "is not intended to sway the judge's deliberations as to the adequacy of the proposed statement or summary; rather it is intended as a predicate for requesting such substitutes and as an aid to the court in understanding the language

Congress thus provided that the government may submit a damage assessment *after* the court has determined that the evidence is relevant.

### III. CIPA AND THE JUDICIARY

#### A. *Discovery Under CIPA Section 4 and Balancing*

Circuit courts have applied *Roviaro* balancing when resolving issues of discovery of classified information. For example, the First Circuit in *United States v. Pringle*<sup>90</sup> affirmed the lower court's holding that the classified materials the defendant sought in discovery should not be made available. While ruling that the information was not relevant to the defense, the lower court also applied the *Roviaro* balancing test and "concluded that the national security would be damaged if the information and materials sought were disclosed to the defendants or the public."<sup>91</sup> The Ninth Circuit has engaged in similar balancing.<sup>92</sup>

Although most of the controversy surrounding the use of *Roviaro* balancing arises from its application in admissibility rulings, many of the same concerns are pertinent to the discovery process. Those issues are identified below.

#### B. *Trial Admissibility Under CIPA Section 6 and Balancing*

The Fourth Circuit, in *United States v. Smith*, ruled that, in section 6(a) "use, relevance, and admissibility" hearings, the trial judge should balance the defendant's need to disclose classified information at trial

chosen for the summary statement." The report reiterated the intent that "the admissibility rulings required by section 102 [comparable to CIPA § 6(a)] be prior to and distinct from the ruling on a section 103 [comparable to CIPA § 6(c)] motion." H.R. REP. NO. 831 pt. 1, *supra* note 36, at 20. 90. 751 F.2d 419 (1st Cir. 1984).

91. *Id.* at 426. Although the Court of Appeals did not explicitly approve the balancing in the lower court's analysis, and instead addressed, with approval, the use of the *Roviaro* "relevant and helpful" test, it is probable that the court also approved balancing. *See* *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (interpreting *Pringle* as approving balancing); *Smith*, 780 F.2d at 1109-10 (same).

92. *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984). Clegg was charged with various offenses based on the sale of arms to Pakistan. He alleged that the weapons were intended to aid Afghanistan "freedom fighters." Brief of Appellant at 12, 23 n.3, *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984) (No. 83-3126); *see* *United States v. Clegg*, 846 F.2d 1221 (9th Cir. 1988). Clegg sought discovery of classified material to establish approval of the transfer. In a § 4 statement, submitted to the court *in camera* and *ex parte*, the prosecution urged the judge "to consider the sensitivity of the classified material in relation to the speculative nature of the assertions made by the defense." Government's Preliminary Statement at 17, *United States v. Clegg*, No. CR83-51R (W.D. Wash.), *aff'd*, 740 F.2d 16 (9th Cir. 1984). According to the Central Intelligence Agency, the information specified in the defense discovery request "struck a tangential matter that the government must protect." Office of General Counsel, Central Intelligence Agency, *Experiences Under the Classified Information Procedures Act 10* (May 2, 1984) (internal memorandum) (on file at Yale Law Journal). Thus, although not expressly balancing the interests of the parties, the court had before it the necessary information to compare the potential damage of discovery with the defendant's need for the materials. *Clegg*, 740 F.2d at 17. The Court of Appeals affirmed the lower court's finding that the materials sought were discoverable. *Id.* at 18; *see also* *United States v. Clegg*, 846 F.2d 1221 (upholding finding that materials should be admitted at trial).

against the government's interest in keeping the materials out of the public domain.<sup>93</sup> Accused of selling details of Army double agent operations to a Soviet agent, Richard Smith was indicted on five counts of violating the Espionage Act.<sup>94</sup> As part of his trial defense, Smith sought to establish that he reasonably believed he had acquired legal authority to sell the information.<sup>95</sup> Smith invoked CIPA by notifying the government of his intent to disclose classified information at trial to establish his defense.<sup>96</sup> In a section 6(a) hearing, the district court ruled that certain classified information could be introduced at trial.<sup>97</sup>

Initially, on an interlocutory appeal, a panel on the Court of Appeals affirmed the decision of the trial court that the classified information Smith sought to disclose was admissible.<sup>98</sup> Judge Butzner, writing for the panel, noted that the Act did not alter the substantive rules of evidence regarding trial admissibility<sup>99</sup> and that "if Congress had intended the district court to balance national security against relevancy in the [section] 6(a) hearing, provision would have been made for transmission of information necessary for balancing during the [section] 6(a) hearing and not after relevancy and admissibility have been determined."<sup>100</sup> The original panel rejected the government's argument that the privilege of *Roviaro* applied. The court distinguished *Roviaro* by noting that the *Roviaro* court had the information necessary to balance and that it placed limits on the privilege when the information is relevant and helpful.<sup>101</sup>

The panel decision was subsequently vacated, and an *en banc* review was granted.<sup>102</sup> The *en banc* court vacated the trial court's findings as to admissibility and remanded for *Roviaro* balancing. The court majority attempted to reconcile its holding with the explicit legislative history forbidding the balancing of competing interests by arguing in a footnote that "we do not read into the Senate Report a necessary inconsistency, and construe it as we do the House Report to mean any balancing not already required by existing law."<sup>103</sup> Arguing next that the "trial court is required to balance the public interest in nondisclosure against the defendant's right to prepare a defense," the court cited *Roviaro* as authority,

93. 780 F.2d 1102, 1110 (4th Cir. 1985) (en banc).

94. *United States v. Smith*, 592 F. Supp. 424, 427 (E.D. Va.), *aff'd*, 750 F.2d 1215 (4th Cir. 1984), *rev'd*, 780 F.2d 1102 (4th Cir. 1985) (en banc).

95. *Id.* at 428.

96. *Smith*, 780 F.2d at 1103.

97. The trial court found the classified information relevant to Smith's defense under the principles of Federal Rule of Evidence 401. *Id.* at 1104.

98. *United States v. Smith*, 750 F.2d 1215 (1984), *rev'd*, 780 F.2d 1102 (4th Cir. 1985) (en banc).

99. *Id.* at 1217.

100. *Id.* at 1218.

101. *Id.* at 1219.

102. *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (en banc).

103. *Id.* at 1106 n.8.

claiming that it was not extending that holding.<sup>104</sup> The dissent, written by Judge Butzner, essentially restated the original panel decision,<sup>105</sup> arguing in addition that the rejection of the administration's bill illustrated the legislative intent to prevent judicial balancing of party interests.<sup>106</sup> The dissent also argued that *Roviaro* is limited to discovery requests and does not cover information possessed by the defendant.<sup>107</sup>

Recently, in *United States v. Zettl*,<sup>108</sup> the Fourth Circuit again ruled that *Roviaro* balancing should be applied in the section 6(a) hearing. Relying on *Smith*, the court held that the trial judge need not postpone considerations of national security until after the relevancy determination.<sup>109</sup>

Courts have thus applied *Roviaro* reasoning to both discovery and admissibility of classified information.<sup>110</sup> Assuming Congress understood the current state of evidence law, the *Smith* and *Zettl* courts probably violated the intent of Congress when they allowed trial courts to balance the defendant's need for disclosure against the interests of national security in section 6(a) relevancy hearings.

In addition to the conflict with legislative will, balancing should not occur in the section 6(a) hearing for procedural reasons. In that hearing, the judge is directed to determine the relevance of the classified information listed in the defendant's notice. The government does not submit the classification affidavit until the section 6(c) alternative disclosure hearing. CIPA does not even provide for a section 6(c) hearing until the trial judge

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104. *Id.* at 1107.

105. *See id.* at 1111 (Butzner, J., dissenting); *see also* Note, *supra* note 51, at 729-35 (expounding Judge Butzner's dissent).

106. *Smith*, 780 F.2d at 1112 (Butzner, J., dissenting). During the drafting of CIPA, even the administration claimed it was not introducing a balancing standard in its bill. *See supra* notes 74-75 and accompanying text. The administration's bill enunciated a test like that in *Roviaro* only to the extent that *Roviaro* raised the relevancy standard; it did not suggest an evaluation of the harm of disclosure. Congress never had the opportunity to reject any *Roviaro* balancing proposals.

107. *Smith*, 780 F.2d at 1113 (Butzner, J., dissenting). Even Judge Butzner presumably would allow *Roviaro* balancing under CIPA discovery requests. As he argued in his dissent: "This is clearly explained in *United States v. Pringle*, on which the majority relies. There the court pointed out that none of the defendants 'possessed classified information which they threatened to disclose. Quite to the contrary, they were seeking classified information which the government sought to protect.'" *Id.* (quoting *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984)) (footnote omitted).

108. 835 F.2d 1059 (4th Cir. 1987).

109. The case is astounding because the government interpreted the *en banc Smith* decision to forbid balancing in the § 6(a) hearing and to permit privilege claims only in the § 6(c) hearing. *Zettl*, 835 F.2d at 1062-67. Despite the efforts of the trial judge, the government insisted on this misreading of *Smith* throughout the § 6(a) hearings. *Id.* at 1062. The trial court judge eventually acquiesced and ruled that the material was relevant without considering possible government privileges. In the § 6(c) alternative disclosure hearing, the trial judge held that the government provided inadequate substitutes, *id.* at 1063, and ruled the material admissible. On appeal, the case was remanded for further § 6(a) proceedings with the application of the same type of balancing allowed in the *en banc Smith* decision. *Id.* at 1066. The charges against Zettl's co-defendants were subsequently dropped to minimize the public disclosure of classified material. *See U.S. Drops All Charges Against 2 in GTE Case*, N.Y. Times, Mar. 19, 1988, § 1, at 36, col. 5.

110. The courts are split on the issue of *Roviaro* balancing in § 6(a) relevancy hearings. Compare *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987) (balancing appropriate) and *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (*en banc*) (same) with *United States v. Juan*, 776 F.2d 256 (11th Cir. 1985) (balancing inappropriate).

has ruled the classified information admissible in the section 6(a) proceeding.<sup>111</sup> Given that the court does not even have the necessary information to balance until the section 6(c) alternative evidence hearing, the judge certainly should not weigh competing interests in the antecedent section 6(a) relevancy hearing.

#### IV. RESOLUTION: A TWO LEVEL APPROACH

CIPA should be clarified to establish two sets of parallel evidentiary tests: the first to deal with discovery requests for classified information; the second to rule on admissibility of classified materials made available to the defendant. Although seemingly reversed in order, this Note will first address trial admissibility determinations, and then focus on the discovery process. The need to alter discovery procedures will become apparent only after a discussion of the trial admissibility modifications.

##### A. *Admissibility Rulings*

###### 1. *Level One: Relevancy Determination*

The court should determine relevance according to the ordinary rules of relevance and admissibility under the Federal Rules of Evidence, without regard to the classified status or sensitivity of the materials. The structure of CIPA makes *Roviaro* balancing impractical at this stage of the proceedings. In addition, limiting the scope of the judicial inquiry to the materiality of the information to the defense will minimize the potential prejudicial effect of the national security horror stories.

For the purpose of ruling on the materiality of information to the defendant's case in the section 6(a) relevance hearing, there is no need for the court to evaluate the harm of disclosing any particular document. The relevance determination is independent of governmental interests.

###### 2. *Level Two: Alternative Disclosures and Roviaro Balancing*

If the trial judge deems the material relevant, the government must acquiesce to the admission of the information at trial in some form acceptable to the court<sup>112</sup> or risk dismissal of the charges related to the evidence. The government should be permitted both to offer alternatives to the original materials and to provide the court with the reasons for the classification or the sensitivity of the information.<sup>113</sup> Creating substitutes for origi-

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111. See A.B.A. COMM. ON LAW AND NAT'L SEC., LITIGATING NATIONAL SECURITY ISSUES 5-6 (Aug. 9, 1982) (statement of attorney Earl Silbert).

112. Under CIPA, the judge can admit substitutes for relevant classified material if the substitutes "provide the defendant with substantially the same ability to make his defense" when compared to the original materials. 18 U.S.C. app. § 6(c)(1).

113. The defendant should also be permitted to offer substitutes for the original classified materials. See *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987).



nal classified materials necessarily entails an understanding of why a particular deletion or summarization is needed.<sup>114</sup> The court should then balance the defendant's need for the original form of the information against the government's interest in preventing disclosure of the original material.<sup>115</sup> Balancing should aid the judge only in determining what form to admit the classified information. This procedure reduces the prejudicial effect of allowing national security concerns to permeate the relevancy determination.

*Roviaro* balancing has a legitimate function outside of the discovery context.<sup>116</sup> Because the prosecution of those who have been involved with intelligence agencies is especially susceptible to graymail and those defendants may not need to rely on the discovery mechanism to obtain classified information, limiting *Roviaro* balancing to discovery significantly weakens CIPA. If used as forwarded here, the legitimacy and value of *Roviaro* balancing extends beyond the bounds of discovery.<sup>117</sup>

The CIPA scheme can be applied consistently with this approach. The Act provides for a bifurcated process. The judge determines relevancy in the section 6(a) hearing *in camera* after the defendant has filed notice. Only if the material has been found to be relevant will the court turn to the issues surrounding alternatives to the information. As the Eleventh Circuit held in *United States v. Juan*, "[i]n appraising materiality [in the Section 6(a) hearing], the court is not to consider the classified nature of the evidence. . . . However, in passing upon a motion under Section 6(c) the trial judge should bear in mind that the proffered defense evidence does involve national security."<sup>118</sup> In addition, should the government refuse to reveal classified information ruled admissible, the defendant's right to a fair trial may require dismissal of the charges related to the nondisclosed materials.<sup>119</sup>

### 3. *Reconciling Roviaro Balancing in Admissibility Rulings and Congressional Intent*

One can reconcile balancing in CIPA procedures and the express Congressional intent against balancing, as the *Smith* majority did, by arguing

114. See *supra* notes 86, 89 and accompanying text.

115. See *Graymail Legislation, 1979, supra* note 27, at 122 (statement of Philip Lacovara).

116. The prosecutions involving vast amounts of classified information previously disclosed to defendants by virtue of past government employment (such as the Iran-Contra case) would be plagued by graymail problems if *Roviaro* balancing was limited to discovery requests. See *supra* notes 1-6, 13-15 and accompanying text.

117. "The government's interest is still protectable although [the defendant] may have had access to the information. The privilege is not extinguished by previous disclosure to the defendant alone. The government interest to be protected here includes disclosure of the information to the public." *Smith*, 780 F.2d at 1109.

118. *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985); see *Graymail Legislation, 1979, supra* note 27, at 21 (statement by Rep. McClory) (similar language).

119. CIPA provides for sanctions, including the dismissal of charges. 18 U.S.C. app. § 6(e)(2).

that the legislature intended to prevent more balancing than existed prior to the enactment of CIPA.<sup>120</sup> A more plausible argument, however, is that Congress never intended to freeze the standard by passing CIPA; rather, it intended CIPA to function solely as a procedural measure.<sup>121</sup>

No evidence suggests that Congress intended to *prevent* the altering of the relevancy and admissibility standards by enacting CIPA.<sup>122</sup> Should the courts determine that an evidentiary doctrine should not be extended to cover a certain situation, CIPA is not a basis for arguing in favor of the extension. Conversely, if the courts determine that an evidentiary rule should be extended or altered, CIPA does not forbid the change.<sup>123</sup> The development of evidentiary standards (including the extension of *Roviaro*) should continue as the courts deem necessary, with CIPA as the frame for proceedings that implement the developing rules of evidence.

## B. *Discovery Rulings*

CIPA should be modified to provide for the same type of bifurcation in section 4 discovery hearings as is now in place for section 6 hearings. By amending section 4 to include an *in camera* ruling on the relevance of requested material without regard to its classified status, and by providing for balancing when ruling on suggested alternative disclosures, the discovery process and the admissibility process will act in parallel.

### 1. *Level One: Relevancy Determination*

Currently, government challenges of classified information discovery based on national security claims are made simultaneously with challenges of the information's relevance to the defense.<sup>124</sup> The two considerations should be treated separately.<sup>125</sup>

120. *United States v. Smith*, 780 F.2d 1102, 1109-10 (4th Cir. 1985) (en banc). In addition, indicating that the considerations of relevance should be kept separate from consideration of the harms that disclosure could cause, the bifurcation of procedures can be seen as underscoring Congressional rejection of the contention that *Roviaro* balancing is appropriate in determining relevancy. *Smith*, 780 F.2d at 1111 (Butzner, J., dissenting). On the other hand, the bifurcation also indicates that balancing is appropriate to determine in what form the relevant classified materials will be presented at trial.

121. See *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983).

122. By creating CIPA, Congress was not speaking to the dynamics of evidentiary relevancy standards at all, and did not enact CIPA with an eye towards establishing affirmative legislative authority for judicial alteration of existing rules.

123. The House Committee on Intelligence Report, H.R. REP. NO. 831 pt. 1, *supra* note 36, did refer to the state secrets privilege, arguing that it could not be applied to criminal trials. See *supra* note 53. The state secrets privilege is distinct from the *Roviaro* balancing approach. Under the state secrets privilege, the information is presumed to outweigh the interests of the defendant. For an argument that such a privilege should attach in CIPA cases, see Tamanaha, *supra* note 18, at 315-24.

124. E.g., *Pringle*, 751 F.2d at 426; Government's Preliminary Statement 14, 17, *United States v. Clegg*, No. CR83-51R (W.D. Wash.), *aff'd*, 740 F.2d 16 (9th Cir. 1984); see *United States v. Morrison*, 844 F.2d 1057, 1078 (4th Cir. 1988); *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).

125. There is no reason to believe that the prejudicial effect of national security concerns would color a discovery decision any less than an admissibility ruling. See *supra* note 85 and accompanying text.

Upon a request for classified documents, the trial judge should determine if the requested materials relate to a cognizable defense.<sup>126</sup> The judge should request the government to provide the court with the classified documents if the materials reasonably can be expected to relate to the defense, and should be authorized to levy sanctions against the prosecution for failure to produce the material to the court. The judge should review the classified information *in camera* with no party before it. If the judge determines that the material is not relevant to the defense under normal standards of discovery,<sup>127</sup> the defense motion to compel production should be denied.<sup>128</sup> The court should not inquire into the national security damage that discovery could cause.

## 2. *Level Two: Discovery Determination*

This stage of the discovery proceedings should function in a manner similar to the present approach taken under Federal Rule of Criminal Procedure 16(d)(1). If the court determines that the material would be helpful to the defense, it should entertain, *ex parte* and *in camera*, government submission of reasons why the information should not be disclosed to the defendant.<sup>129</sup> The government should also be permitted to offer substitutions of and stipulations to the relevant information in the classified materials.<sup>130</sup> The court, in reviewing the alternatives, should consider the harm that discovery would cause. The defendant may view the substitutions offered by the government, but should not see the underlying documents.<sup>131</sup> The court should be permitted to balance the government's interest in nondisclosure with the defendant's need for discovery when creating alternative disclosures.<sup>132</sup> The court should retain the power to revoke any of its findings of adequacy of substitutions if it later finds that the defendant's need for nondisclosed material outweighs the government's interest in protecting the material.<sup>133</sup> The material can be

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126. This is the essence of the discovery standards set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory evidence) and FED. R. CRIM. P. 16(a)(1)(C) (documents material to preparation of defense). The defendant should be permitted to provide the court with the reasons why the requested materials are relevant to the preparation of a defense.

127. Government privilege, for example, would not be considered at this stage.

128. See, e.g., *United States v. Porter*, 701 F.2d 1158, 1162-63 (6th Cir.), cert. denied, 464 U.S. 1007 (1983); *United States v. Berg*, 643 F. Supp. 1472, 1481 (E.D.N.Y. 1986), reconsideration denied, 658 F. Supp. 253 (E.D.N.Y. 1987).

129. This aspect of the proposal is analogous to the classification affidavit currently permitted under § 6(c).

130. See 18 U.S.C. app. § 4.

131. CIPA provides for protective orders to prevent disclosure of discovered classified information. 18 U.S.C. app. § 3. By providing the defendant with access to the substitutions, the defendant may be able to argue for more helpful disclosures and play an active role in the process.

132. Of course, this is not an unlimited privilege, as *Roviaro* made clear. See *supra* note 58 and accompanying text.

133. This allows for the development of defenses as the prosecution proceeds and for maintenance of flexibility in the defendant's case posture. Cf. *Tamanaha*, *supra* note 18, at 310-11 (expressing need for flexibility in defense development).

used to prepare a defense, but is not necessarily admissible. Should the defendant wish to use the discovered classified information at trial, the defendant should be required to notify the government under section 5 of CIPA.

As in the admissibility arena, the key safeguard for the defendant under this proposal lies in the bifurcated character of the process. The court should not consider the classified status of the materials until relevance has been established.<sup>134</sup> Then the government may explain to the judge why the information is classified. The court may then shape alternatives to full disclosure of the materials to the defendant, but the judge's initial ruling concerning relevance will not be tainted by the potential threats to national security.

### CONCLUSION

CIPA undoubtedly decreases the chance that prosecutions involving classified information will be aborted for fear of damaging disclosures.<sup>135</sup> It may slow the progress of trials, but if used as suggested here, CIPA will provide for procedural guidelines that facilitate the accommodation of national security and due process concerns. Rejection of the *Smith* and *Zetttl* rationale and modification of CIPA discovery procedures are critical steps towards applying CIPA in a manner that will minimize graymail while securing fair trials for defendants.

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134. In an internal memo, the CIA suggested a litigation strategy that appears to be somewhat consistent with the approach forwarded here. The memo stated that attorneys in any CIPA case should "first argue regular discovery issues on the classified information, i.e., rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963)] issues, if there is *any* doubt as to whether the classified information is discoverable. If the Government loses on those issues, it can invoke section 4 and submit an *in camera ex parte* submission [sic]." Office of General Counsel, Central Intelligence Agency, Experiences Under the Classified Information Procedures Act 10 (May 2, 1984) (emphasis in original) (internal memorandum) (on file at Yale Law Journal).

135. *E.g.*, *United States v. Walker*, 796 F.2d 43 (4th Cir. 1986) (court affirmed conviction of espionage in proceedings using CIPA); the *Wilson* cases, *supra* note 16; *see Groner, supra* note 2, at 4, col.1.